

No. 14787

United States
Court of Appeals
for the Ninth Circuit

RICHARD WAYNE FRANK, Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record	
on	15
Designation of Record on (DC).....	14
Notice of	13
Statement of Points on (USCA).....	42
Stipulation and Order Extending Time to	
Docket	14
Stipulation of Facts and Stipulation and Or-	
der re Exhibits on	5
Certificate of Clerk to Transcript of Record....	15
Designation of Record on Appeal (DC).....	14
Indictment	3
Judgment and Commitment	10
Motion for Judgment of Acquittal.....	7
Names and Addresses of Attorneys.....	1
Notice of Appeal	13
Statement of Points to be Relied Upon on Ap-	
peal (USCA)	42

Stipulation and Order Extending Time to	
Docket Appeal	14
Stipulation of Facts and Stipulation and Order	
re Exhibits	5
Transcript of Partial Proceedings and Testi-	
mony	16
Witnesses:	
Frank, Richard Wayne	
—direct	17
—cross	25
—redirect	31
Pettijohn, Mary A.	
—direct	34
—cross	38

NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant United States Attorney
Chief of Criminal Division;

CECIL HICKS, JR.,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, South-
ern District of California, Central Division
September, 1954, Grand Jury

No. 24043—CD

UNITED STATES OF AMERICA,
Plaintiff,
vs.
RICHARD WAYNE FRANK,
Defendant.

INDICTMENT

(U.S.C., Title 50 App., 462—Universal Military
Training and Service Act)

The Grand Jury charges:

Count One (U.S.C., Title 50 App. 462)

Defendant Richard Wayne Frank, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 31, said board being then and there duly created and acting under the Selective Service System established by said Act, in Contra Costa County, California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-O and was notified of said classification; on February 10, 1954, said defendant was ordered to report for civilian work contributing to the maintenance of the national health, safety and interest on

February 23, 1954, at the County of Los Angeles Department of Charities, 1100 North Mission Road, Los Angeles 33, California; on or about February 23, 1954, in Los Angeles County, California, within the Central [2] Division of the Southern District of California, the defendant did knowingly and wilfully refuse to accept said employment and by the aforesaid conduct the defendant did knowingly and wilfully fail and neglect to perform a duty required of him under the said Act and the regulations promulgated thereunder. [3]

Count Two (U.S.C., Title 50 App., 462)

Defendant Richard Wayne Frank, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 31, said board being then and there duly created and acting under the Selective Service System established by said Act, in Contra Costa County, California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-O and was notified of said classification; on June 1, 1954, said defendant was ordered to report for civilian work contributing to the maintenance of the national health, safety and interest on June 11, 1954 at the County of Los Angeles Department of Charities, 1100 North Mission Road, Los Angeles, California; on or about June 18, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, the de-

fendant did knowingly and wilfully refuse to accept said employment and by the aforesaid conduct the defendant did knowingly and wilfully fail and neglect to perform a duty required of him under the said Act and the regulations promulgated thereunder.

A True Bill.

/s/ W. H. REPLOGE,
Foreman

/s/ LAUGHLIN E. WATERS,
United States Attorney [4]

[Endorsed]: Filed January 12, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Richard Wayne Frank, Defendant, in the above entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 31 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Richard Wayne Frank, is a registrant of Local Board No. 31.

3. As Clerk of Local Board No. 31, is legal custodian of the original Selective Service file of Richard Wayne Frank.

4. The Selective Service file of Richard Wayne Frank is a record kept in the normal course of business by Local Board No. 31, and it is the normal course of Local Board No. 31's business to keep such records. [5]

It Is Further Stipulated that a photostatic copy of the original Selective Service file of Richard Wayne Frank, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the contents of the original Selective Service file on Richard Wayne Frank.

It Is Further Stipulated that a photostatic copy of the Selective Service file of Richard Wayne Frank, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the original Selective Service file of Richard Wayne Frank.

Dated this 1st day of March, 1955.

LAUGHLIN E. WATERS,

United States Attorney

LOUIS LEE ABBOTT,

Asst. U. S. Attorney, Chief of
Criminal Division

/s/ CECIL HICKS, JR.,

Asst. U. S. Attorney,

Attorneys for Plaintiff

/s/ J. B. TIETZ,

Attorney for Defendant

/s/ RICHARD WAYNE FRANK,

Defendant

It Is So Ordered this 2nd day of March, 1955.

/s/ ERNEST A. TOLIN,

United States District Judge [6]

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the ministerial classification is illegal, arbitrary and capricious because the draft boards employed artificial standards in determining what constitutes a minister of religion within the meaning of the Act and Regulations; and they did not follow the definition of the term used in the Act and Regulations [7] in determining the claim of the defendant as a minister of religion.

4. The denial of the ministerial classification by the draft boards was arbitrary and capricious in that they held that the performance of secular work by the defendant, alone, without determining whether it was his avocation and used his perform-

ance of secular work to defeat illegally his ministerial status because the undisputed evidence showed that he is not engaged in secular work as a main business but only incidentally to his main work of the ministry, and that, according to the Act and Regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church and pursues such preaching work as his vocation and does not preach incidentally to the performance of any secular work; and therefore the draft board order is illegal, contrary to law and without basis in fact.

5. The denial of the claim for exemption as a minister of religion by all of the draft boards, and each of them, is without basis in fact, arbitrary, capricious and contrary to law.

6. The order of the local board for defendant to perform civilian work at Los Angeles Department of Charities, Los Angeles, and sections 1660.1 and 1660.20 of the Selective Service regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training and Service Act.

7. The Act, as construed and applied by the regulations and the order, calls for a private non-federal labor draft for the performance of services that are not exceptional or related to the National defense, in violation of the Thirteenth Amendment to the United States Constitution.

8. The Act, as construed and applied by the regulation and order, is unconstitutional because it

deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

9. Section 462 (a) of the Act, Part 1660 of the regulation insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

10. Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

11. The State Director usurped the authority of the Director contrary to the regulations.

12. There was no evidence that the work to which the Selective Service System assigned the defendant met the requirement of the law.

13. Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

14. The local board abused its discretion by arbitrarily refusing to grant defendant an Appearance Before Local Board, in December 1951 when he personally presented a written request for the appearance.

15. The defendant was denied procedural due process in that the local board failed to forward his file to the Appeal Board in December 1951 when his request for the Appearance Before Local Board

was denied and his excuse for late filing was not accepted.

16. The defendant was denied procedural due process in that the Selective Service System did not comply with its regulation §1660.20. [9]

17. The defendant was denied due process when the local board arbitrarily refused to reopen his classification on and after December 17, 1951 when he presented new evidence not previously considered, which if true, required a reclassification.

18. The defendant was denied due process when the Appeal Agent did not take an administrative appeal for defendant in December 1951.

March 1, 1955.

Respectfully submitted,

/s/ J. B. TIETZ

[10]

[Endorsed]: Filed March 3, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 24,043—Criminal

UNITED STATES OF AMERICA

vs.

RICHARD WAYNE FRANK

JUDGMENT AND COMMITMENT

On this 3rd day of March, 1955, came the attorney for the government and the defendant appeared in person and by J. B. Tietz, Esq., his attorney,

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty of the offenses of defendant being a male person within the class made subject to selective service under the Universal Military Training and Service Act, defendant being classified in Class 1-O, on Feb. 10, 1954 defendant was ordered to report for civilian work at the County of Los Angeles Department of Charities, and on or about Feb. 23, 1954, in Los Angeles County, California, defendant did knowingly and wilfully refuse to accept said employment; on June 1, 1954, defendant was ordered to report for civilian work at the County of Los Angeles Department of Charities, and on or about June 18, 1954, in Los Angeles County, California, defendant did knowingly and wilfully refuse to accept said employment and by the aforesaid conduct of the defendant he did knowingly and wilfully fail and neglect to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder, in violation of U.S.C., Title 50 App., 462, as charged in Counts 1 and 2 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for

a period of four (4) years on Count 1, execution of sentence is suspended and the defendant is placed on probation for a period of three years on condition the defendant enters into civilian employment of the type contributing to the national health, safety and interest, It Is Further Ordered the defendant be so employed ten days from this date in an institution that renders the type of service the defendant was directed to enter as ordered by his Local Draft Board. During the period of probation the employment of the defendant as ordered, will be for three years.

It Is Adjudged that imposition of sentence on Count 2 is suspended and the defendant is placed on probation for a period of two years. Probation on Count 2 to commence and run upon expiration of probation on Count 1. Conditions of probation on Count 2 is obedience to all laws and all rules and regulations of the Probation Office.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ERNEST A. TOLIN,

United States District Judge

/s/ WM. A. WHITE,

Deputy Clerk

[11]

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Richard Wayne Frank, resides at 5473 Clayton Road, Concord, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C. Title 50 App. Sec. 462—Selective Service Act, 1948, as amended.

On March 3, 1955, after a verdict of Guilty on both counts, the Court sentenced the Appellant, on the first count, to confinement in an institution to be selected by the Attorney General, for four years, suspended execution of said sentence and placed defendant on probation for a term of three years (with certain selective service type employment conditions) and gave defendant a probationary sentence of two years on the second count.

I, J. B. Tietz, appellant's attorney being authorized by [12] him to perfect an appeal do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,

Attorney for Appellant [13]

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

EXTENSION OF TIME

For good cause shown, defendant is hereby given 60 additional days, to and including June 11, 1955, to prepare and docket the record on appeal.

Dated: April 5, 1955.

/s/ LEON R. YANKWICH,
Judge

The appellee stipulates to the above requested extension of time, being assured by counsel it will be sufficient.

LAUGHLIN E. WATERS,
United States Attorney
/s/ By CECIL HICKS, JR.,
Asst. U. S. Attorney [14]

[Endorsed]: Filed April 5, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are hereby designated as the record which is material to the proper consideration of the Appeal filed by Richard Wayne Frank, in the above entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter).

3. All Exhibits in evidence or proffered are to be transmitted to the Court of Appeals.

4. Notice of Appeal.

5. Designation of Record.

6. All Stipulations.

7. All written motions.

/s/ J. B. TIETZ,

Attorney for Appellant [15]

Affidavit of Service by Mail attached. [16]

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages number 1 to 16, inclusive, contain the original Indictment; Stipulation; Motion for Judgment of Acquittal; Judgment and Commitment; Notice of Appeal; Extension of Time; Designation of Record; which, together with a full, true and correct copy of one volume of Reporter's Transcript of Proceedings had on March 2, 1955; and Plaintiff's Exhibit 1; all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 9th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
 Clerk
/s/ By CHARLES E. JONES,
 Deputy

In the United States District Court for the Southern District of California, Central Division

No. 24,043—Cr.

UNITED STATES OF AMERICA,
 Plaintiff,

vs.

RICHARD WAYNE FRANK,
 Defendant.

REPORTER'S PARTIAL TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California, March 2, 1955

Before: Honorable Ernest A. Tolin, Judge presiding.

Appearances: For the Plaintiff: Laughlin E. Waters, United States Attorney, by Cecil Hicks, Jr., Assistant United States Attorney, 600 Federal Bldg., Los Angeles, Calif. For the Defendant: J. B. Tietz, 257 So. Spring St., Suite 534, Los Angeles, Calif. [1*]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

* * * * *

Mr. Tietz: Mr. Frank, will you please step around and take the witness stand.

RICHARD WAYNE FRANK

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Tietz): You are Richard Wayne Frank? A. Yes.

Q. You are the defendant in this case, are you not? A. Yes.

Q. When you were being processed by local Board No. 31 of the California Selective Service System, did you have occasion to visit the Board office? A. Yes.

Q. Frequently or just once or twice?

A. Quite a few times.

Q. Did you have occasion when you were in the local Board office to take a look at the bulletin board? A. Yes.

Q. Did you ever see on the bulletin board a notice saying the names and addresses of advisers to registrants [2] who would give you free service?

A. No.

Q. In June of 1954—I believe the date is June 14th, rather than June 18th, as stated in Count Two of the Indictment—you went to the Los Angeles County Department of Charities, pursuant to an order given you at your local Board office on June 11, 1954, did you not?

(Testimony of Richard Wayne Frank.)

A. Yes, I went there.

Q. Did you talk to a Mrs. Pettijohn there, as you reported to your local Board by a letter, which is sheet or page 161 of the Selective Service File?

A. Yes, I talked to her.

Q. You state in your letter, "I reported to the Los Angeles Department of Charities as directed and spoke to a Mrs. Pettijohn, who told me that they had stopped taking I-O applicants * * *"

She told you that?

A. Yes.

Q. You had some discusison with her as to what kind of jobs they had, if they did take I-O applicants, did you not? A. Yes, I did.

Q. Now, in the early and middle part of 1951 I believe you had what was then called the IV-E classification. A. Yes. [3]

Q. And the law changed and it became the I-O classification in the fall of '51 and they sent you a I-O classification card? A. Yes.

Q. Did you want that I-O? A. No.

Q. What did you want?

A. I wanted a minister's classification.

Q. You knew that was IV-D in 1948 and you told them that in 1948 and every opportunity thereafter, did you not? A. Yes, I did.

Q. When you got that I-O, and because of the change in the law you then became obligated to perform 24 months of work away from your ministry. What did you do?

A. I asked for a personal appearance.

(Testimony of Richard Wayne Frank.)

Q. Why did you do that?

A. So I could get my IV-D classification.

Q. How did you know about that? Did you get a notice—strike that.

You received a postcard from the local Board that told you about your I-O classification in November of 1951, did you not? A. Yes.

Q. And that postcard had on it information as to what you could do if you didn't like that I-O classification? [4]

A. Yes, the card had on it the right to appeal that.

Q. What was the first step of the right of appeal?

A. To appeal to your Board there, local Board for personal appearance.

Q. You did that in writing, as shown by page 36? I will show you the photocopy of the file and I have it opened to page 36. Is that the letter you refer to? A. Yes.

Q. Under what circumstances did you transmit that letter to your local Board?

A. I took the letter down to the local Board personally and presented it to the clerk.

Q. What was said, if anything, at that time?

A. Well, I presented it to her. She told me it was late.

I told her I realized that, that is why I brought it down, to see if she would accept it.

Q. Did you explain to her why it was late?

A. Yes, I explained to her the circumstances.

(Testimony of Richard Wayne Frank.)

The Court: Tell us what you told her. Then we will know whether it was an explanation or not.

The Witness: I told her I thought I had ten days from the date I received the letter to appeal it, and I received the letter rather late due to its going to the wrong address.

For a while there they were sending my mail, addressing [5] my mail to Clayton instead of Concord. My address was Clayton Road, Concord, and they were sending it to Clayton Road, Clayton; I don't know why.

Before they corrected that it happened that the letter was a few days late. When I found that out, rather than sending it in with no explanation, I went down personally and presented it to her and told her the circumstances, and asked if she would accept it.

Q. What did she say?

A. She said she would take the letter and present it to the Board there and it would be up to them to accept it. It wouldn't be up to her. And that she would let me know.

Q. Did you get any kind of an appearance before the local Board? A. No.

Q. Did you get any kind of an administrative appeal? A. No.

Q. Now, I believe you represented to the local Board in 1948 that you were an ordained and a regular minister. Will you tell us about your ministry?

(Testimony of Richard Wayne Frank.)

A. At that time I was devoting all my time to the ministerial work.

Q. When you say all your time, give it to us in hours and tell us what similar work you were doing.

Mr. Hicks: I object to this. We are bound by the record that he made with the local Board, and not by what he may testify to now.

Mr. Tietz: May I make a comment? This may save a little time.

Mr. Hicks is correct in the present state of the law, the Supreme Court has held just what he says.

I am laying the groundwork for a new point and if the court sustains the objection I would like to make a proof and I would then like to be able to argue it later.

The Court: Make your point now, and if I can I will rule on it now. If I need to take time, I will take time.

Mr. Tietz: My point is this: The Selective regulations specifically forbid a registrant to have a lawyer at this appearance before the local Board. That is the only opportunity he has to meet the Board members. At all times it is by the mails or talking with the clerk.

He had one or more appearances before the local Board at the end of his processing, and, as the file shows, those appearances were at the request of the Selective Service and not at his request.

Every time he attempted to introduce facts or arguments or to point out things in his file about

(Testimony of Richard Wayne Frank.)

his IV-D ministerial claim, which at an ordinary personal appearance hearing the regulations give him that right, but every time he attempted to do that he was informed the purpose of the hearing was not to consider his classification, but only what kind of work he [7] was to take under the work program. He was prohibited from having a lawyer at those hearings; the regulations says so.

Now, my point is this: It is a new point in Selective Service, and in defense of Selective Service cases, that it may be all right—I am going into an argument that will take two or three minutes, but it will save time later.

The Court: Go ahead.

* * * * *

Q. (By Mr. Tietz): Will you tell us about your ministry, with respect to the activities you engaged in during the period of your Selective Service processing, because that is what we are concerned with. Start at the beginning.

You may refresh your memory by looking at the exhibit, if that will help you. You filed a classification questionnaire in 1948, did you not?

A. Yes.

Q. On page 7 of the questionnaire, now known as page 12 of the exhibit, you were asked what classification you should be in and you said IV-D, the ministerial classification, isn't that right?

A. Yes.

Q. Then on page 3, which is now page 7 of the exhibit, you pointed out, or made the certification

(Testimony of Richard Wayne Frank.)

to the Selective Service System that you were duly ordained and you also were regularly serving as a minister, were you not? [8] A. Yes.

Q. That was in October 1948. What details concerning your ministry did you note in that eight-page document, such as what you did? I believe there is no mention of exactly what you did, is there? A. As to my ministerial activities?

Q. Yes.

A. Well, I engaged in going from door to door in my ministerial activities.

Q. What did you do when you went from door to door?

The Court: Does that show from this file? I have read those written statements by this defendant in the Selective Service file, which I gather, from them, was that he devoted his full time, except for occasional employment, doing the work commonly done by the Jehovah Witnesses, such as going from door to door and preaching where he could get anyone to listen.

And in addition to that, attending and presiding over meetings which occurred on Sundays and on certain other days. I think there is one showing of Thursday meetings.

Mr. Tietz: Yes. Then I will require only one or two questions to amplify it.

Q. (By Mr. Tietz): What are back calls?

A. That is calling back upon people who seem to be interested in the Bible, and trying to establish regular home [9] Bible studies with them.

(Testimony of Richard Wayne Frank.)

Q. You systematically make calls back to persons you had already contacted? A. Yes.

Q. How many times a week, in addition to Thursday, did you, during the period, regularly engage in studies with others or by yourself?

A. Practically every evening was taken up either with someone—studying with someone or preparing for my other activities, as presiding over meetings.

Q. Did you have a study called a Watch Tower?

A. Yes.

Q. What does that consist of?

A. That is our——

Q. I don't believe that is mentioned in there.

A. That is our magazine, Bible magazine we get two times monthly. We hold a systematic Bible study from that magazine, using it as a textbook every Sunday.

Q. Who is that? Who is "we"?

A. The whole congregation participates in that study, and at that time I was presiding over that.

Q. This congregation consists of a congregation of ministers or laymen? A. Ministers.

Q. All are ministers? [10] A. Yes.

Q. In addition to that, doesn't each one of these ministers have a territory that is his exclusively for some period? A. Yes.

Q. That is his congregation, also? A. Yes.

Q. So that each one of the Jehovah Witnesses really has two congregations, isn't that right?

A. That is true.

(Testimony of Richard Wayne Frank.)

Mr. Tietz: That wasn't mentioned in there.

I believe it is not necessary to elaborate further on that point.

You may cross examine.

* * * * *

Cross Examination

Q. (By Mr. Hicks): Mr. Frank, during the period of your classification, starting, say, in the fall of 1949 through 1951, or a period a little over two years, how many times did you visit the local Board? Just answer as best you can recall.

A. I couldn't tell you. Until 1951?

Q. Through 1951, how many times did you visit the local Board?

A. There were quite a few times there, I suppose. I [11] couldn't tell you just exactly how many.

Q. Do you recall what you did on the occasion that you visited the local Board?

A. You mean the purpose for why I went there? I think one time in particular I went there to present new evidence into my file.

I believe also in 1950 I went there for the purpose of telling them I was going to be away for a while, not exactly a change of address—I did give them a change of address there, too, in 1950, when I got married.

Also when I went to New York in 1950 I am sure I let them know then that I went. I am not too positive on that.

Q. Would you say you went there maybe a half

(Testimony of Richard Wayne Frank.)

a dozen times in that period of time of a little over two years? A. At least that.

Q. On each one of those occasions, did you look at the bulletin board when you went to the local Board?

A. Many times I had occasion to wait there and I looked at the bulletin board.

Q. Do you recall what you saw on the bulletin board? A. Yes.

Q. What did you see on the bulletin board?

A. On one side—very small room—they have a list of different people that had been getting out of the Army, different classifications they were being given. [12]

On the other side of the bulletin board they had little posters telling one different benefits one would have in the Army, and so forth like that; those I remember.

Is this a pretty good sized bulletin board, three or four feet across, something like that?

A. Probably so.

Q. And was there quite a bit of material on the bulletin board? A. No, not too much.

Q. Would you say there were 10 or 12 different things on the bulletin board?

A. Well, on this one bulletin board there might have been 10 or 12 different pages of the same material, but not different individual articles.

Q. Not different matters. Can you say here today, Mr. Frank, that you know that on each of

(Testimony of Richard Wayne Frank.)

those visits to that local Board there was not a list of advisers posted there?

A. Yes, I can say that.

Q. You know they weren't there?

A. If they were there I would have seen them.

Q. Mr. Frank, did you at any time speak to the clerk of the local Board during this period of time?

A. Yes.

Q. Through 1951, did you speak to the clerk of the local Board or anyone else at the local Board, saying you [13] would like to have some advice as to your rights and liabilities, and that sort of thing?

A. Well, I don't think I used those very words. In presenting that letter, was the only time there.

Q. Did you at that time ask, "Where can I get some advice about this"? A. No.

Q. At any time did you ask where you could get some advice?

A. Not through 1951 I didn't, no.

Q. Now, through that period——

A. Not through that period of time, but later I did.

Q. Later you asked the clerk at the local Board?

A. Yes, I asked the Board members where I could get some advice.

Q. What did they tell you?

A. Well, they referred me to—what I asked them was concerning this I-O job, different things about it. None of them seemed to know. They referred me to a certain individual, a lady—for information, that she was from the State Selective

(Testimony of Richard Wayne Frank.)

Service—just concerning the job. Later I think she was there at the Board meeting. I think she was there, something like that.

Q. You mean someone that you talked to just with respect to the civilian employment? [14]

A. Yes, someone from the State Selective Service.

Q. Now, Mr. Frank,—

The Court: While you are looking it up, we will take our afternoon recess.

(Short recess taken.)

The Court: Are you ready to proceed?

Mr. Hicks: Yes, I am.

The Court: All right.

Q. (By Mr. Hicks): Mr. Frank, you were ordered by your local Board to report for civilian work and you got that order early in June of 1954, is that right? A. Yes.

Q. You reported to the local Board on June 11th, is that right? A. Yes.

Q. The order you received told you to go to the Los Angeles County Department of Charities and report there on the 14th, the instructions they gave you at the local Board, is that right?

A. Yes.

Q. Did you report there on the 14th?

A. Yes.

Q. Where did you go when you went to the Department of Charities, the personnel office?

A. Yes, the personnel office there. [15]

Q. You had been there once before?

(Testimony of Richard Wayne Frank.)

A. Yes, I had.

Q. Did you talk to the same person you spoke to earlier? A. Yes, I did.

Q. When you had been there earlier, at that time you told them you wouldn't accept work that didn't give you more free time, is that the substance of it? A. Yes, that is right.

Q. The hours they had weren't satisfactory, is that correct? A. That is right.

Q. On June 14th did you only speak to one person?

A. Well, I probably spoke to the receptionist.

Q. I mean in regard to this matter.

A. Mrs. Pettijohn.

Q. You only spoke to Mrs. Pettijohn?

A. Yes.

Q. Did Mrs. Pettijohn tell you at that time they would not put you to work?

A. She told me she thought their commitment had been filled.

Q. Did she tell you at that time—that wasn't my question, Mr. Frank. Did she tell you at that time they wouldn't put you to work? [16]

A. Well, I don't know exactly how to answer that. I will say yes, she told me they wouldn't put me to work.

Q. She said, "You can't go to work," in effect?

A. Well, she said she would find out. She said she thought the commitments were full, but she would find out. That is what she said.

(Testimony of Richard Wayne Frank.)

Q. Did you have any other discussion with her at that time then?

A. Yes, she said, however, the jobs would be exactly the same as before. She said, "There is no change in the jobs."

Q. What did you say then?

A. I said, "Well, I wouldn't be able to accept it then."

Q. And you wouldn't take the work?

A. No.

Q. At any time did you ask them to employ you because of the order you had received from your local Board?

A. No, I didn't ask them——

Q. Did you hand her the order you received from your local Board?

A. Oh, yes, she kept that.

Q. At that time she said, "You can't go to work here," in effect?

A. In effect, I guess she did. [17]

Q. Mr. Frank, you once worked for the Golden State Dairy, didn't you?

A. Yes.

Q. In Concord.

A. Yes.

Q. You worked delivering milk?

A. Yes.

Q. Do you recall when you started that employment?

A. January 1, 1949, I believe.

Q. You continued to work there through August of 1952?

A. Yes, I suppose so.

Q. During that time were you working full time?

Mr. Tietz: I object. I think it should be made

(Testimony of Richard Wayne Frank.)

specific what he means by "full time". We all have general ideas about that.

The Court: The witness doesn't have to answer it yes or no. He should answer it yes or no, but he isn't limited to the yes or no. If he answers it yes, he may give an explanation. If he answers it no, he may give an explanation.

Mr. Hicks: I would be happy to withdraw the question and reframe it.

The Court: I would kind of like to hear the answer.

The Witness: Yes, it was an eight-hour job five days a week.

Q. (By Mr. Hicks): You worked a 40-hour week? [18]

A. 40-hour week, basically, yes.

Mr. Hicks: I have no further questions, your Honor.

The Court: Redirect only.

Mr. Tietz: Beg pardon?

The Court: Redirect only. No repetition of what we have had.

Mr. Tietz: I am getting ready for my final argument. That is why I am bringing my papers up.

The Court: You mean you are going to argue and the witness may step down?

Mr. Tietz: I have two or three questions first.

The Court: All right.

Redirect Examination

Q. (By Mr. Tietz): During this period that

(Testimony of Richard Wayne Frank.)

Mr. Hicks has asked you about, you worked for a dairy, how many hours a week did you average during all that period in your ministerial work?

A. Oh, an average of a hundred hours a month, probably.

Mr. Tietz: That is all.

The Court: Any further questions?

Mr. Hicks: No further questions.

(Witness excused.)

The Court: We will take the report from the Grand Jury and then hear argument on this case, unless you have other evidence, of course. [19]

Mr. Hicks: Your Honor, I am a little bit embarrassed. I feel compelled to call this Mrs. Pettijohn. This letter here from the defendant, I interpreted in a different light than the defendant's testimony would indicate.

In effect, his testimony has been he couldn't reject any employment because it was not there offered to him. He was refused it. In view of that, I feel compelled to call Mrs. Pettijohn. I don't have her here or under subpoena.

The Court: We are going to finish the trial today.

Mr. Hicks: I can't have Mrs. Pettijohn here today.

The Court: Can you have her here first thing in the morning?

Mr. Hicks: I know nothing about her. I assume I could contact her.

The Court: Where is she located?

Mr. Tietz: General Hospital, Los Angeles.

The Court: All right. You may consider this case recessed for a few minutes while I take the Grand Jury report, and start your subpoena process for 9:30 tomorrow.

Mr. Hicks: May I be excused from the courtroom?

Mr. Tietz: May I offer a suggestion? Possibly Mr. Hicks can get her on the telephone and get her in here this afternoon in half an hour, and then conclude all the testimony.

This man is from way up north. He came down just for [20] this trial.

The Court: This is an important case to him. He can stay here overnight.

Mr. Hicks: I will offer this as an alternative: I perhaps could reach Mrs. Pettijohn by telephone, if she is in an office. If I can, if what the defendant said is substantially what she says, I will have no more evidence to offer.

The Court: If you can get her here today I won't mind waiting a little after 5:00 to finish today. We have another case set at 10:00 in the morning, but if necessary, I will hear Mrs. Pettijohn at 9:30 in the morning.

(Short recess taken.)

The Court: The court understands from chambers conference with counsel that the witness who Mr. Hicks desires to call in rebuttal is going to testify as to only one or two points and will be available later in the afternoon today.

Counsel both expressed themselves as agreeable

to arguing the other points beginning now, and we will take that witness' testimony when she appears.

Is that correct?

Mr. Tietz: Yes, sir.

Mr. Hicks: That is correct.

The Court: All right.

* * * * *

The Court: You have a witness present? [21]

Mr. Hicks: May I call her now, your Honor?

The Court: Yes.

MARY A. PETTIJOHN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated. Your full name, please?

The Witness: Mary A. Pettijohn.

Direct Examination

Q. (By Mr. Hicks): Mrs. Pettijohn, where are you employed?

A. At present Civil Service Commission, County.

Q. Where were you employed before you worked there?

A. Before that I worked for the Los Angeles County Department of Charities at the General Hospital.

Q. Were you employed there in June of 1954?

A. Yes, I was.

Q. Directing your attention, Mrs. Pettijohn, to

(Testimony of Mary A. Pettijohn.)

on or about June 14, 1954, were you employed at the Los Angeles County Hospital at that time?

A. Yes.

Q. In what capacity?

A. Chief clerk in the personnel office.

Q. Did you ever have occasion to meet Richard Wayne Frank?

A. Yes. [22]

Q. Do you recognize Mr. Frank when you see him? A. Yes.

Q. Do you see him in the courtroom?

A. Yes, I do.

Q. Where is he?

A. Sitting right over there (indicating).

Q. Sitting back here on this bench (indicating)?

A. Yes.

Q. Do you recall whether or not you saw Mr. Frank on or about June 14, 1954?

A. I checked with the hospital and the record I kept at that time said he was in the office.

Q. On the 14th?

A. I have the 16th here.

Q. Just on or about that time.

A. Around that time, yes.

Q. Did you speak to him yourself on that day?

A. Yes.

Q. Do you recall what your conversation with him was on that day?

A. Well,——

Q. Let me reframe that. Repeat your conversa-

(Testimony of Mary A. Pettijohn.)

tion as best you can recall, what he said and what you said on that day.

A. If I remember correctly, I talked to Mr. Frank on [23] two different occasions. One was early in the year and then he returned later on, and it was in June.

Mr. Tietz: If the court please, may I ask a few questions on voir dire?

The Court: For what purpose?

Mr. Tietz: To see if this recollection is from the witness' recollection or whether it is from a review of some papers she has in front of her, and if those papers were not made by her I would interpose an objection.

The Witness: These were made by me this afternoon from records I had made at the hospital at that time.

Mr. Tietz: You made these now?

The Witness: Right now.

Mr. Tietz: And you made records on June 14th or 16th, or some such date?

The Witness: Yes.

Mr. Tietz: And you copied from your own records?

The Witness: They were read to me over the phone after Mr. Hicks called me today, to refresh my mind, my memory.

Mr. Tietz: I think I should interpose an objection.

The Court: Let me ask a question. As you sit here now, with these notes that you have, do you

(Testimony of Mary A. Pettijohn.)

remember the transaction or are you just going to read the notes to us?

The Witness: No, I remember the transaction, but I didn't remember just the date and what information I had [24] written on the report I sent back to the State.

The Court: You tell us the conversation then, as you remember it.

The Witness: Well, could I go back to February when I first talked to him?

Q. (By Mr. Hicks): Will that make——

The Court: I will withdraw my question and overrule your objection, counsel.

Mr. Tietz: I am going to object now to an answer in February. We are not concerned with February. I didn't raise any objection. That is, the defendant testified only as to what occurred in June.

The Witness: Well, all right. I will tell what happened in June.

The Court: Well, let Mr. Hicks ask a question. I think, counsel, that this is a case of present recollection revived, rather than past recollection recorded.

We are going to allow the witness to testify as to her present recollection, which is apparently stimulated into new life by the refresher of the notes. She is not going to tell us what the notes say. She is going to tell us what is in her memory now, that has been brought back to activity by the notes.

The Witness: I talked in a period of a year and a half to, oh, I would say close to 200 boys, and it

(Testimony of Mary A. Pettijohn.)

is a little [25] difficult to remember what you say to each one, unless you can bring something back into your memory.

The Court: Let's let Mr. Hicks ask a question and then if you can answer it from your present recollection, answer it. Answer as best you can.

The Witness: Fine.

The Court: If you can't, if it is confused in your memory, just tell us.

The Witness: All right.

Q. (By Mr. Hicks): I will ask you, Mrs. Pettijohn, what your conversation was, as best you can recall it word for word, with the defendant on or about June 14th.

A. On or about June 14th, as I remember, Mr. Frank returned to our office and in the meantime we had had orders sent from his Draft Board, saying he should report to us on the 11th of June at 8:00 a.m.

When he came in I remembered that he had been there before and asked him if the situation were still the same, he would not be willing to work any hours assigned to him.

And he said that he wouldn't, and as far as I know, that is the result, all of our conversation.

Mr. Hicks: I have no more questions.

Cross Examination

Q. (By Mr. Tietz): If somebody hadn't read off something to you on the [26] telephone this aft-

(Testimony of Mary A. Pettijohn.)

ernoon, would you be able to testify as you have just testified?

A. Yes. I couldn't have given you the dates, but I could have testified to that.

Q. When Mr. Frank came to your office on about June 14, 1954, didn't you at that time tell him that your quota of I-O's was filled and you had no more vacancies for I-O work?

A. Not to my knowledge, no.

Q. Do you recall that that was a fact at that time?

A. It would not have been a fact, as long as we had received orders on him. We didn't turn away anyone that we had received orders on.

The Court: Had you received orders?

The Witness: Yes, we had orders he was to report to us on the 11th of June.

Q. (By Mr. Tietz): Those orders came from the Selective Service System, didn't they?

A. That is right.

Q. Do you know what your quota was at that time?

A. We didn't have any set quota. It depended on how many people were going in and out of service.

Q. How many I-O's did you have working at I-W work at that time?

A. I would say around 119. [27]

Q. Did you have any amount stated in figures, like 120 or 150 or 100 that you were to take of these I-O's?

A. No.

(Testimony of Mary A. Pettijohn.)

Q. Then the number you took depended on other employment factors? A. That is right.

Q. Would your records show whether or not at that time there were any vacancies for the kind of work given to these I-O's?

A. I think you perhaps could go back to the records and find that out.

Q. When you talked to your informant this afternoon on the telephone, did you ask if there were any openings for I-O's about that time, June 14th?

A. No.

Q. Was there any time during that period when you were not taking any I-O's?

A. Not if we had received orders on them.

Q. You mean that even though there might not be an opening for their type of work, you would take them and put them on the payroll?

A. We would have taken them within a period of three or four days. We would have made some arrangements on some position in the various categories we hired.

Q. This defendant has testified that you told him [28] that your quota was full and there were no jobs for I-O's at that time, and that you then discussed what he would or wouldn't do if an opening developed later. Would you say that is incorrect?

A. What I might have told him was that we had no jobs with regular hours that he wanted. I could have told him that. There are certain positions, such as clerical positions, that we filled if

(Testimony of Mary A. Pettijohn.)

we had vacancies, where they would have regular day hours and would be able to be off on Sunday, which, I believe, was the day Mr. Frank said he had to be off.

Q. He testified flatly to that, that you had told him there were no I-O jobs open at that time. Do you say that is an incorrect statement of your conversation?

A. I say that is an incorrect statement, yes.

Mr. Tietz: That is all.

Mr. Hicks: No further questions, your Honor.

The Court: Thank you, Mrs. Pettijohn. You are excused.

(Witness excused.) * * * * *

(Whereupon, at 5:20 o'clock p.m., Wednesday, March 2, 1955, an adjournment was taken to Thursday, March 3, 1955, at 9:30 o'clock a.m.)

[Endorsed]: Filed June 6, 1955.

[Endorsed]: No. 14787. United States Court of Appeals for the Ninth Circuit. Richard Wayne Frank, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 10, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14787

RICHARD WAYNE FRANK, Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above entitled cause.

I.

Defendant was denied procedural due process in that the local board failed to have available an Advisor to Registrants and to have posted conspicuously, or any place, the names and addresses of such advisor, as required by the Regulations, and to defendant's prejudice.

II.

The local board abused its discretion by arbitrarily refusing to grant defendant an Appearance Before Local Board, in December, 1951 when he personally presented a written request for the appearance.

III.

The defendant was denied due process when the local board arbitrarily refused to reopen his classification on and after December 17, 1951 when he

presented new evidence not previously considered, which if true, required a reclassification.

IV.

The defendant was denied procedural due process in that the local board failed to forward his file to the Appeal Board in December, 1951 when his request for the Appearance Before Local Board was denied and his excuse for late filing was not accepted.

V.

The defendant was denied due process when the Appeal Agent did not take an administrative appeal for defendant in December, 1951.

VI.

The defendant was denied procedural due process in that the Selective Service System did not comply with its regulation §1660.20.

VII.

The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

VIII.

The order of the local board for defendant to perform civilian work at Los Angeles Department of Charities, Los Angeles, and sections 1660.1 and 1660.20 of the Selective Service Regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training and Service Act.

IX.

The Act, as construed and applied by the Regulations and the order, calls for a private nonfederal labor draft for the performance of services that are not exceptional or related to the national defense, in violation of the Thirteenth Amendment to the United States Constitution.

X.

The Act, as construed and applied by the regulation and order, is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

XI.

Section 462 (a) of the Act, Part 1660 of the regulation insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

XII.

Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

/s/ J. B. TIETZ

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1955. Paul P. O'Brien,
Clerk.